TAN SRI SHAMSUDDIN ABDUL KADIR & ANOR A

v.

DOW JONES & COMPANY INC & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
HISHAMUDIN YUNUS J
[CIVIL SUIT NO. S4-23-14-2003]
25 AUGUST 2005

CIVIL PROCEDURE: *Judgments and orders - Setting aside, application for - Ex parte order granting leave to plaintiffs to issue and serve notice of writ of summons out of jurisdiction on defendants - Defendants applied to enter conditional appearance - Whether application fundamentally defective - Conditional or unconditional appearance - Grounds of application - Whether defendants' application to set aside ex parte order and service of notice of writ misconceived* C D

CIVIL PROCEDURE: *Writ of summons - Service out of jurisdiction - Setting aside, application for - Ex parte order granting leave to plaintiffs to issue and serve notice of writ of summons out of jurisdiction on defendants - Defendants applied to enter conditional appearance - Whether application fundamentally defective - Conditional or unconditional appearance - Grounds of application - Whether defendants' application to set aside ex parte order and service of notice of writ misconceived* E

CIVIL PROCEDURE: *Appearance - Conditional appearance - Whether defendants' application to enter conditional appearance fundamentally defective - Whether defendants' appearance must be regarded merely as an unconditional appearance - Grounds of application - Rules of the High Court 1980, O. 12 r. 7* F G

Enclosure 34 was an appeal by the 1st, 2nd and 4th defendants ('the defendants') against the decision of the learned senior assistant registrar ('the SAR') dismissing with costs their application (*vide* encl. 23) to set aside: (i) an *ex parte* order (encl. 5) granting leave to the plaintiffs to issue and serve a notice of H writ of summons out of jurisdiction on the defendants ('the plaintiffs' *ex parte* order'); and (ii) service of the notice of the writ of summons on the defendants pursuant to the aforesaid encl. 5. In the present action, the plaintiffs sued the defendants for the tort of defamation in respect of an article appearing in one of the I issues of the Asian Wall Street Journal. It was not disputed that pursuant to the plaintiffs' *ex parte* order (granted under O. 11 r. 1(h) Rules of the High Court 1980 ('RHC') as the defendants

were out of jurisdiction), the notice of the writ of summons was served on the defendants in New York and Hong Kong respectively by the agents of the plaintiffs. Upon being served with the notice of the writ, the defendants made an *ex parte* interlocutory application before the SAR for leave to enter a conditional appearance (encl. 15), intending to apply to the court (in the event that leave was granted) to set aside the notice of the writ of summons and/or to set aside the service of the notice of the writ of summons. The SAR granted the defendants' application. The issue requiring determination was whether encl. 15 was fundamentally flawed and defective, and, as a result thereof, whether encls. 23 and 34 ought to be dismissed.

Held (dismissing the appeal):

(1) The defendants' appeal in encl. 34 must be dismissed with costs because the learned SAR was right in dismissing the defendants' application *vide* encl. 23 with costs. Enclosure 23 must be dismissed with costs because the defendants' conditional appearance at encl. 16 must be regarded merely as an unconditional appearance as encl. 15 was misconceived and fundamentally defective, which meant the application for leave to file a conditional appearance ought not to have been granted by the SAR in the first place. (para 43)

(2) Enclosure 15 was misconceived and fundamentally defective because of three reasons, namely: (a) the ground/reason for the *ex parte* application for leave as referred to either in the *ex parte* summons in chambers or in the supporting affidavit, was materially deficient and, hence, there was serious non-compliance with O. 32 r. 1 and Form 62 of the RHC; (b) the defendants had failed to make full and frank disclosure in their *ex parte* application for leave; and (c) the said *ex parte* application was misconceived because the intended next step contemplated by the defendants (if leave was granted) was to invoke O. 12 r. 7 RHC, but, considering the ground/reason for the *ex parte* application for leave, it was not appropriate for the defendants to have invoked O. 12 r. 7 RHC. (para 43)

(3) As the court would regard the defendants' appearance only as an unconditional appearance, therefore, legally, the defendants could not have applied to set aside the plaintiffs' *ex parte* order at encl. 5 and the service of the notice of the writ on the defendants. In order to set aside the plaintiffs' *ex parte* order,

the defendants must in the first place have entered a conditional appearance (as required by O. 12 r. 7 RHC). (para 43)

(4) Even if the court were to regard the defendants' appearance as a valid conditional appearance, still, the defendants, legally, could not have applied *vide* encl. 23 to set aside the plaintiffs' *ex parte* order at encl. 5. This was because when applying for leave to file a conditional appearance, the defendants had clearly mentioned that the application was for two purposes, namely, to set aside the notice of the writ summons and the service of the notice of the writ. The defendants, when making the application *vide* encl. 23, could not bring in any other grounds other than the sole ground mentioned in their application for leave to enter a conditional appearance, namely, that the plaintiffs' statement of claim did not disclose any cause of action. (para 43)

(5) It was misconceived of the defendants to have made an application under O. 12 r. 7 RHC to set aside the plaintiffs' *ex parte* order and the service of the notice of the writ on the defendants. This was because the only complaint that could be brought by the defendants *vide* encl. 23 was that the plaintiffs' statement of claim failed to disclose any cause of action. If this then was the defendants' only complaint, then, procedurally, the appropriate course of action that the defendants should have taken was to have entered an unconditional appearance and thereafter to invoke O. 18 r. 19(1)(a) RHC to apply to strike out the statement of claim and to have the plaintiffs' action dismissed. (para 43)

(6) In any case, the defendants' contention that the plaintiffs' statement of claim did not disclose any cause of action was without merit as the court, upon examining the statement of claim, was satisfied that it did disclose a cause of action, namely, the tort of libel. (para 43)

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [2000] 2 CLJ 473 CA ***(refd)***

Balakerisnan & Anor v. Muniandy Varathan & Anor [2005] 3 CLJ 327 HC ***(refd)***

Dormeuil Freres SA & Anor v. Nicolian International (Textiles) Ltd [1988] 3 All ER ***(refd)***

N Caruppaiya v. MBf Property Services Sdn Bhd & Anor [2000] 4 CLJ 116 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 11 r. 1(h), O. 12 rr. 6, 7, O. 18 r. 19(1)(a), O. 32 r. 1, Form 62

For the plaintiffs - John Skelchy; M/s Zaid Ibrahim & Co
For the defendants - Jeffrey John; M/s Shafee & Co

Reported by Suresh Nathan

JUDGMENT

Hishamudin Yunus J:

[1] Enclosure 34 is an appeal to the judge in chambers by the 1st, 2nd and 4th defendants (hereinafter shall be referred to collectively as the 'defendants') against the decision of the learned senior assistant registrar given on 24 September 2003 dismissing with costs their application (*vide* encl. 23):

(a) to set aside an *ex parte* order dated 8 March 2003 (encl. 5 – hereinafter shall be referred to as the 'plaintiffs' *ex parte* order') granting leave to the plaintiffs to issue and serve a notice of writ of summons out of jurisdiction on the defendants; and

(b) to set aside service of the notice of the writ of summons on the defendants pursuant to the aforesaid plaintiffs' *ex parte* order (encl. 5).

[2] This appeal does not concern the 3rd defendant.

[3] I have dismissed the appeal with costs.

[4] I shall now give my grounds.

[5] The 1st plaintiff is a businessman in Malaysia. The 2nd plaintiff is the son of the 1st plaintiff and is also a businessman in Malaysia.

[6] The 1st defendant company is the owner of a newspaper known as the Asian Wall Street Journal and has its head office in New York.

[7] The 2nd defendant company is the publisher of the Asian Wall Street Journal and has its business address in Hong Kong. The 2nd defendant is the Asian subsidiary of the 1st defendant.

[8] The 4th defendant is the editor of the Asian Wall Street Journal who permanently resides in Hong Kong.

[9] The Asian Wall Street Journal newspaper has a wide circulation in Malaysia.

[10] In the present action, the plaintiffs sue the defendants for the tort of defamation in respect of an article appearing in one of the issues of the Asian Wall Street Journal. The article is entitled 'Perwaja Probe Focuses on a Payment'.

[11] The plaintiffs' statement of claim reads as follows:

Statement Of Claim

1. The 1st and 2nd plaintiffs are prominent Malaysian businessmen. The first plaintiff is the father of the 2nd plaintiff.

2. The 1st defendants were and are the proprietor of a newspaper known as The Asian Wall Street Journal and/or were and are the owner of the copyright and/or the trademark of The Asian Wall Street Journal. Alternatively, the 1st defendants, as proprietor of The Asian Wall Street Journal gave its authority to and/or consent for the publication of The Asian Wall Street Journal. It has its corporate headquarters at 200, Liberty Street, New York, New York 10281. The Asian Wall Street Journal enjoys a wide circulation in Malaysia.

3. The 2nd defendants were and are the publishers of The Asian Wall Street Journal and having its business address at 25/F, Central Plaza, 18, Harbour Road, G.P.O. Box 9825, Hong Kong. It is the Asian subsidiary of the parent company in New York, i.e. the 1st defendants.

4. The 3rd defendant is the author of the article entitled "Perwaja Probe Focuses on a Payment" which was published in the 15.5.02 issue of The Asian Wall Street Journal. The 3rd defendant is resident in Malaysia with an address at Suite 11-01, Menara Dion, 27, Jalan Sultan Ismail, 50250 Kuala Lumpur.

5. The 4th defendant was and is the editor of The Asian Wall Street Journal with an address for service at 25/F, Central Plaza, 18, Harbour Road, G.P.O. Box 9825, Hong Kong.

6. In the 15.5.02 issue of The Asian Wall Street Journal, the 3rd defendant wrote and the 1st, 2nd and 4th defendants published an article entitled "Perwaja Probe Focuses on a Payment" ("the Article") which is defamatory of the plaintiffs. The plaintiffs rely on the Article as a whole, its

A headline cited above, the sub-title that reads "New Clues About $30.6 Million Transfer Could Cause Problems in Malaysia" and the following passages from it (collectively referred to as "the Words"):

B a. "New clues about a mysterious payment at the center of one of Southeast Asia's biggest financial scandals could stir trouble in Malaysia."

C b. "Malaysian authorities investigating the near-collapse of state-owned steel-maker Perwaja Terengganu have zeroed in on a payment of about $30.6 million made by the company in relation to the construction of a new plant. The payment was first disclosed in a 1995 internal Perwaja report where it was alleged to be illegal. The investigators, Malaysia's Anti-Corruption Agency, won't comment on the probe, which they say is still under way." D

E c. "But according to interviews and documents seen by the Asian Wall Street Journal, the payment benefited Sakyo Corp., a Japanese concern owned by Yasuomi Osada a former adviser to Perwaja who acted as a middleman for a consortium of Japanese companies that had a contract to build a specialized-steelmaking plant for the state-owned concern. The other shareholder in Sakyo is Shahril Shamsuddin, the son of well-known Malaysian businessman Shamsuddin Abdul Kadir."

F d. The disclosure of where this particular Perwaja payment went could become a political hot potato for Prime Minister Mahathir Mohamad, who has been in power for 21 years and on whose watch a number of business scandals involving taxpayer funds have occurred and are unresolved." G

e. People familiar with the matter say the investigators targeted the $30.6 million payment largely because of Perwaja's 1995 internal report, which alleged that one of the steel company's main operating units, Perwaja Rolling H Mill & Development Sdn. Bhd., misused proceeds of a $196 million loan from a Japanese consortium led by Itocho Corp. that included Nissho Iwai Corp. and Tomen Corp."

I f. "The loan followed the granting in 1993 by Perwaja Rolling Mill of a contract valued at 76 billion yen (US$805 million at the time) to the Itochu-led consortium to build the specialized steel plant. The

proceeds were to be used to buy spare parts and technical services for the new plant that were provided by NKK Corp. Instead, the report said, the loan was "fully utilized for other purposes," including the $30.6 million payment in early 1994 made to the Hong Kong bank account of Frilsham Enterprises Inc., a British-Virgin islands-registered company."

g. "In mid-February 1994, Perwaja Rolling Mill received a letter on NKK stationery purported signed by N Otani, a director at NKK's engineering division, asking for the payment "in compliance with the technical services agreement concluded" Nov. 4 1993. The NKK letter stated that it wanted payment to be made to Frilsham, which was described as an "associated company" of NKK."

h. "Within a week, the money was transferred to a just-opened Frilsham account at the American Express Bank Ltd. in Hong Kong."

i. People familiar with the Perwaja probe say that by late 1996 the investigators had established that Mr. Osada and a close associate, Yuji Maeda, a freelance business consultant ..."

j. Mr. Maeda, who in the 1980's was employed in Malaysia and Japan by Tan Sri Shamsuddin's Sapura group, which has interests in cable manufacturing and telecommunications, couldn't be contacted."

k. "According to the previously unpublicized statutory declaration by Mr. Osada recorded in May 1999 in Kuala Lumpur and seen by The Asian Wall Street Journal, the $30.6 million payment represented fees due to Sakyo, a company he controlled, by the Itochu-led consortium."

l. "Mr. Osada acknowledged that he is the majority shareholder of Sakyo with a 75% stake. He said the remainder is held by Malaysian businessman Datuk Shahril, who Mr. Osada said holds the shares on behalf of his father, Tan Sri Shamsuddin."

7. The Article referred to and was understood to refer to the plaintiffs. In their natural and ordinary meaning, the words meant and were understood to mean that the plaintiffs, jointly and/or severally:

a. were involved in or had something to do with the alleged financial scandals in Perwaja, relating to the payment of US$30.6 million;

b. obtained illegal and illicit benefits from this US$30.6 million;

c. were the subject of probes conducted by the authorities into the shady deal involving the Perwaja payment of US$30.6 million;

d. conspired with other person(s) to commit fraud involving US$30.6 of Perwaja's funds;

e. have committed criminal offences; and

f. are dishonest men.

8. Further or in the alternative, the Words in their context bore, and were understood to bear, the meanings pleaded in paragraph 7 by way of innuendo.

Particulars Of Innuendo

The plaintiffs repeat the particulars set out in paragraph 7.

9. All these allegations are false. By reason of these matters, the plaintiffs have been gravely injured in the reputation and standing and have been brought into public scandal, odium and contempt.

[12] It is not disputed that pursuant to the plaintiffs' *ex parte* order (granted under O. 11 r. 1(h) of the Rules of the High Court 1980 (the 'RHC'), as the defendants are outside the jurisdictions) the notice of the writ of summons was served on the defendants in New York and Hong Kong respectively by the agents of the plaintiffs on 26 March 2003 (see the affidavit of Jeffrey John, the solicitor for the defendants at encl. 17). In New York the notice of the writ was served on the 1st defendant by a firm of solicitors known as Messrs Watson, Farley & Williams on behalf of the plaintiffs. In Hong Kong the notice of the writ was served on the 2nd and 4th defendants by a firm of solicitors known as Messrs Kwok & Yih on behalf of the plaintiffs (see the affidavit of Charis Wong, the solicitor for the plaintiffs at encl. 31).

[13] Upon being served with the notice of the writ, the defendants made an *ex parte* interlocutory application before the senior assistant registrar for leave to enter a conditional appearance. Under the RHC entering a conditional memorandum

of appearance is not as of right. One must obtain prior leave of the High Court before filing such an appearance; and the practice is to make the application before the senior assistant registrar/ deputy registrar of the High Court. The rule is provided by O. 12 r. 6 of the RHC. It stipulates:

6. Conditional appearance (O. 12 r. 6)

(1) A defendant to an action may with the leave of the Court enter a conditional appearance in Form 16 in the action.

(2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 7 and the Court makes an order thereunder.

[14] The procedure is also governed by Practice Note No. 4 of 1980. The defendants filed their application seeking leave by way of an *ex parte* summons in chambers. The *ex parte* summons in chambers is at encl. 15. The purposes for making the application for leave to enter a conditional appearance are mentioned in prayer 2 of the *ex parte* summons in chambers (encl. 15). The purposes are that the defendants intend to apply to the court (in the event that leave is granted) to set aside the notice of the writ of summons and/or to set aside the service of the notice of the writ of summons. Paragraph 2 of the prayers of the defendants' *ex parte* summons in chambers at encl. 15 reads:

2. Defendan Pertama, Ke-2 dan Ke-4 dibenarkan lanjutan masa selama 30 hari dari tarikh Perintah ini selaras dengan Aturan 12 Kaedah 7 untuk memfailkan permohonan untuk mengenepikan Writ Saman dan/atau penyampaian Writ Saman tersebut.

[15] (It is important to bear in mind the dual purpose specified in the defendants' *ex parte* application for leave – but I will come to this later.) Order 32 r. 1 and Form 62 of the RHC require the applicants/defendants to set out the grounds for the application for leave in the *ex parte* summons in chambers itself (and it may be amplified by the supporting affidavit, if any). This is clear. Order 32 r. 1 provides:

Mode of making application (O. 32 r. 1).

1. Except as provided by Order 25 rule 7, every application in Chambers must be made by summons in Form 62.

[16] And Form 62 stipulates:

The grounds of the application are (state the grounds) -

[17] However, notwithstanding the above stipulations of O. 32 r. 1 and Form 62, the grounds for the application are set out only partially in the summons in chambers. They are set out merely as follows:

Alasan-alasan permohonan ini dinyatakan dalam Afidavit Jeffrey John yang diikrarkan pada 14-4-2003 dan difailkan di sini dan antara lain termasuk alasan bahawa Writ dan Pernyataan Tuntutan tersebut tidak mendedahkan apa-apa kausa tindakan terhadap Defendan Pertama, Ke-2 dan Ke-4.

[18] As can be noted above, the summons in chambers states that there are several grounds for the *ex parte* application for leave. However, the summons in chambers gives only one ground: the failure to disclose the cause of action in the statement of claim. What about the other grounds? As for the other grounds, the summons in chambers merely states that they will be set out in the supporting affidavit. The supporting affidavit is at encl. 17 and is affirmed by one Jeffrey George, the solicitor for the applicants/ defendants. The affidavit states:

6. Pada perenggan 2, Pernyataan Tuntutan, Plaintif-Plaintif memplid bahawa Defendan Pertama merupakan pemunya akhbar yang dikenali sebagai The Asian Wall Street Journal dan/atau adalah pemilik hakcipta dan/atau tanda niaga The Asian Wall Street Journal atau secara alternative bahawa Defendan Pertama memberi kuasa kepada dan/atau kebenaran bagi penerbitan The Asian Wall Street Journal. Penelitian selanjutnya Pernyataan Tuntutan tidak mengemukakan apa-apa kausa tindakan terhadap Defendan Pertama.

7. Pada perenggan 3 Pernyataan Tuntutan, Plaintif-Plaintif memplid bahawa Defendan Ke-2 merupakan penerbit The Asian Wall Street Journal dan bahawa Defendan Ke-2 adalah anak syarikat Asia kepada syarikat induk iaitu Defendan Pertama. Penelitian selanjutnya Pernyataan Tuntutan tidak mengemukakan apa-apa kausa tindakan terhadap Defendan Ke-2.

8. Pada perenggan 5 Pernyataan Tuntutan, Plaintif-Plaintif memplid bahawa Defendan Ke-4 merupakan pengarang The Asian Wall Street Journal. Penelitian selanjutnya Pernyataan Tuntutan tidak mengemukakan apa-apa kausa tindakan terhadap Defendan Ke-4.

9. Oleh yang demikian, adalah jelas bahawa Plaintif-Plaintif tidak mempunyai kausa tindakan yang boleh dikuatkuasakan terhadap Defendan-Defendan dalam tindakan ini dan prosiding-prosiding dimulakan oleh Plaintif-Plaintif terhadap Defendan-Defendan adalah remeh dan menyusahkan dan merupakan penyalahgunaan proses Mahkamah dan jelas tidak boleh dipertahankan.

10. Oleh yang demikian, Pernyataan Tuntutan Plaintif-Plaintif tidak mendedahkan apa-apa kausa tindakan terhadap Defendan-Defendan yang dinamakan di sini.

11. Justeru itu, ianya adalah hasrat Defendan-Defendan untuk membuat satu permohonan kepada Mahkamah Yang mulia ini untuk mendapatkan satu perintah untuk membatalkan Writ dan Pernyataan Tuntutan terhadap Defendan-Defendan. Selaras dengan itu, Defendan-Defendan sepatutnya dan secara kebetulannya, pada masa ini, menyebabkan kehadiran bersyarat untuk dimasukkan berkenaan dengan Writ yang difailkan di sini.

[19] It is pertinent to observe that although the *ex parte* summons in chambers (encl. 15) says that the other grounds will be set out in the supporting affidavit, yet an examination of the above supporting affidavit will show that the affidavit does not disclose the other grounds. The supporting affidavit merely repeats the single ground that has already been mentioned in the *ex parte* summons in chambers (encl. 15), namely, the failure to disclose the cause of action in the statement of claim.

[20] However, there is another defect in the application which is more serious. It will be noted that both the *ex parte* summons in chambers (encl. 15) and the supporting affidavit merely assert that the plaintiffs have not disclosed any cause of action in the statement of claim: neither the summons in chambers nor the supporting affidavit explains the assertion. The defendants, either in the *ex parte* summons in chambers (encl. 15) or in their supporting affidavit, do not explain why they say that the plaintiffs have failed to disclose any cause of action in their statement of claim.

[21] In this regard, a pertinent question that needs to be asked is this: in the light of the plaintiffs' statement of claim, which has been served on the defendants, which clearly states that the action is a claim in tort for defamation, and which sets out the particulars or details of the tort alleged, can the defendants in their *ex parte* summons in chambers (encl. 15) seeking leave or in their affidavit in support of the *ex parte* application take a simplistic approach by merely asserting that there is no cause of action disclosed in the statement of claim, without elaborating or explaining the assertion? In my view, considering the nature and content of the statement of claim of the plaintiffs, the defendants' *ex parte* summons in chambers (encl. 15) or affidavit in support must explain, at least briefly (if not in detail), in what way can it be said that the statement of claim does not disclose any cause of action. For example (depending on the position that the defendants take), is it because from the defendants' standpoint the article is not defamatory in nature? Or, is it because, assuming the article is defamatory, it is not defamatory of the plaintiff (from the defendants' standpoint)? Or, is it because assuming the article defames the plaintiffs, the defendants did not write, or are not responsible for the writing of, the article? Or, is it because assuming the article is defamatory of the plaintiffs, there is no publication of the article to a third party? In my opinion, if the *ex parte* summons in chambers (encl. 15) or the affidavit in support does not explain, at least briefly, the assertion, then, the *ex parte* application (encl. 15) is materially insufficient: it is a meaningless application. In other words, the *ex parte* application (encl. 15) for leave application is fundamentally flawed; for the basis for the application is absent.

[22] If the *ex parte* summons in chambers (encl. 15) was fundamentally defective, then, legally, could the senior assistant registrar have granted the leave prayed for, as had happened in the present case (the *ex parte* leave order obtained by the defendants is at encl. 20)? The answer must clearly be in the negative.

[23] Another reason why the *ex parte* application (encl. 15) of the defendants for leave to enter a conditional appearance was fundamentally defective is that there has been a material non-disclosure. If neither the *ex parte* summons in chambers (encl. 15) nor the supporting affidavit of the defendants/applicants explains their assertion that there is no cause of action disclosed in the plaintiffs' statement of claim, when the defendants are under an

obligation to so disclose, considering the nature and content of the plaintiffs' statement of claim which has been served on them, then, there is a material non disclosure on the part of the defendants/applicants. It is a cardinal principle of civil procedure that, when a party makes an application to court, a full and frank disclosure is mandatory – all the more so in an *ex parte* application, where the application is made in the absence of the opposing party or the party that would be directly affected by the ex parte order sought for (in the event it is granted). In *Dormeuil Freres SA & Anor v. Nicolian International (Textiles) Ltd* [1988] 3 All ER Sir Nicholas Browne-Wilkinson VC said (at p. 199):

> It is a basic principle applicable to all *ex parte* applications that a party seeking *ex parte* relief must make full disclosure to the Court of all facts which are material to the exercise of the Court's discretion whether or not to grant the relief.

[24] (See also *Balakerisnan & Anor v. Muniandy Varathan & Anor* [2005] 3 CLJ 327.)

[25] But there is yet another reason why the *ex parte* application (encl. 15) for leave is seriously defective. An important and relevant question to ask here is this: where the defendants' complaint is merely that the statement of claim does not disclose any cause of action against them, can they apply for leave to file a conditional appearance under O. 12 r. 6 with the view to set aside or to strike out the notice of the writ or the service of the notice of the writ under O. 12 r. 7? In my judgment, the answer must be a firm 'No'. In my opinion, seeking leave to file a conditional appearance must only be for the following purposes as specified by O. 12 r. 7 of the RHC. Order 12 r. 7 states:

> **7. Application to set aside writ, etc (O. 12 r. 7)**
>
> (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction.
>
> (2) An application under this rule must be made by summons.

[26] Legally it cannot be for any other purpose other than those specified by the above provision. It is to be observed from the above provision that an ex parte application for leave under O. 12 r. 6 of the RHC to enter a conditional appearance is for limited purposes only; and they are as set out therein, that is:

(1) to apply to the court for an order to set aside the writ; or

(2) to apply to the court for an order to set aside the service of the writ on him; or

(3) to apply to the court for an order to set aside the notice of the writ; or

(4) to apply to the court for an order to set aside the service of the notice of the writ on him; or

(5) to apply to the court for an order declaring that the writ or notice of the writ has not been duly served on him; or

(6) to apply to the court for an order discharging any order giving leave to serve the notice on him out of the jurisdiction.

[27] (In this regard please refer to *N. Caruppaiya v. MBf Property Services Sdn. Bhd. And Anor.* [2000] 4 CLJ 116.) It is also important to observe that O. 12 r. 7 of the RHC refers only to the *ex parte* order granting leave to serve notice of the writ outside the jurisdiction (such as the plaintiffs' *ex parte* order at encl. 5), to the writ or to the notice of the writ. The provision clearly does not refer to the pleadings (ie, the statement of claim or the statement of defence).

[28] In my view, where a defendant merely takes the position that the statement of claim of the plaintiff does not disclose any reasonable cause of action, he cannot legally challenge or impugn the writ (or notice of the writ) or the service of the writ (or notice of the writ) by applying for leave to enter a conditional appearance to set aside the service of the writ (or the notice of the writ). He must not mix writ (or notice of the writ) with pleadings. The RHC has a specific provision for such a complaint (that the statement of claim discloses no reasonable cause of action) and he must invoke that particular provision. The appropriate course of action to be taken by him is to challenge or impugn the statement of claim: not the writ or the notice of the writ. And he can only do this by first filing an unconditional appearance and thereafter to make an application (by summons in

chambers) under O. 18 r. 19(1)(a) of the RHC for the statement of claim to be struck out on the ground that it discloses no reasonable cause of action and for the action to be dismissed. Order 18 r. 19(1)(a) states:

> 19. Striking out pleadings and indorsements (O. 18 r. 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> ...
>
> and may order the action to be stayed or dismissed ...

[29] In this regard I am, however, aware of the contrary view of Jemuri Sarjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [2000] 2 CLJ 473 that once a defendant has filed an unconditional appearance he is precluded from making an O. 18 r. 19 application. In the learned Chief Justice's (Borneo) very own words:

> It is too late now for the defendants to invoke Order 18, rule 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke Order 18, rule 19 but it is still open to them to have recourse to Order 33, rule 2 if they are so minded.

[30] But with the greatest respect, I am unable to agree with the above obiter dicta and in *N. Caruppaiya* I have explained the reason why I am unable to agree. In *N. Caruppaiya* I said (at p. 122-124):

> I shall now revert to *Alor Janggus*. In the light of the authorities and the express provision of O. 18 r. 19 itself the remark of Jemuri Serjan CJ (Borneo) in that case to the effect:
>
> > It is too late now for the defendants to invoke Order 18, rule 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke Order 18, rule 19 but it is still open to them to have recourse to Order 33, rule 2 if they are so minded.

A is, to my humble mind and with the greatest respect, rather unsettling. For such a statement implies that an O. 18 r. 19 application can only be made if the defendant had previously filed a conditional appearance (as opposed to an unconditional appearance). In all humility, I find great difficulty in understanding this proposition. First and foremost, the learned Chief Justice (Borneo) did not explain why the Supreme Court held such a view – that the filing of an unconditional appearance precludes a defendant from making an O. 18 r. 19 application; nor were authorities cited to support the proposition. I find that there is absolutely nothing either in the provision of O. 18 r. 19 or in the provisions of O. 12 rr. 6 and 7 (the provisions dealing with conditional appearance) that stipulates or implies that such an application cannot be made once an unconditional appearance has been filed. On the contrary, such a view as expounded by the Supreme Court appears to run counter to the express provision of O. 18 r. 19 which clearly stipulates that the application may be made at any stage of the proceedings.

In the light of the implication of the Chief Justice's dicta, perhaps it might be of some relevance at this juncture to understand the meaning and purpose of a conditional appearance. According to *Mallal's Supreme Court Practice* 2nd edn. by Tan Sri Datuk Chang Min Tat at p. 68:

> Conditional appearance, meaning of and effect of: The term "conditional appearance" means an appearance in qualified terms, reserving to the appearing defendant the right to apply to the court to set aside the writ or service thereof for an alleged informality or irregularity which renders either the writ or the service invalid.

As to O. 12 rr. 6 and 7, these provisions read:

6. Conditional appearance.

(1) A defendant to an action may with the leave of the Court enter a conditional appearance in Form 16 in the action.

(2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 7 and the Court makes an order thereunder.

7. Application to set aside writ, etc.

(1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the court for an order setting aside the writ or service of the writ, or any notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction.

(2) An application under this rule must be made by summons.

It will be observed from these provisions that the filing of a conditional appearance is necessary, instead of an unconditional appearance, where the defendant intends to take any one of the following steps:

(a) to apply to the court for an order setting aside the writ;

(b) to apply to the court for an order setting aside the service of the writ;

(c) to apply to the court for an order setting aside the notice of the writ;

(d) to apply to the court for an order setting aside the service of the notice of the writ;

(e) to apply to the court for an order declaring that the writ has not been duly served on the defendant;

(f) to apply to the court for an order declaring that the notice of the writ has not been duly served on the defendant; or

(g) to apply to the court for an order discharging any order giving leave to serve the notice on him out of the jurisdiction.

It is very pertinent to note from the above passage of Mallal's Supreme Court Practice and the aforesaid analysis of rr. 6 and 7 that the provisions do not encompass or envisage on O. 18 r. 19 application. The nature of an application under O. 12 r. 7 is not similar to that of an application under O. 18 r. 19. For one thing the former specifically refers to the setting aside of the writ while the latter specifically refers to the striking out of the statement of claim (or the statement of defence, as the case may). What is alleged in an O. 12 r. 7 application is the informality or irregularity of the writ or the service of the writ. But this is not the case in an O. 18 r. 19 application. An application under O. 18 r. 19 does not attack the writ; but is directed at the

A statement of claim (or statement of defence, as the case may be). It is, therefore, clear that the filing of a conditional appearance has no bearing or relevance to the making of an application under O. 18 r. 19.

B In any case, as conceded by Encik Selva Balan for the plaintiff, the above brief remark by Jemuri Serjan CJ (Borneo) in *Alor Janggus* is merely an *obiter dicta*. For, in that case, whether or not the respondents could file an O. 18 r. 19 application, was not the issue before the Supreme Court.

C **[31]** As the defendants in the present case could not legally make an application for leave to file a conditional appearance, since they were merely questioning the statement of claim, and not the writ or the notice of the writ, or the service of the notice of the writ (or the writ), therefore, their *ex parte* application *vide* encl. 15 D seeking leave to file a conditional appearance was misconceived. And since their application was misconceived, the senior assistant registrar, as a matter of law, ought not to have granted the order. The senior assistant registrar ought to have dismissed the application.

E **[32]** To sum up, there are three reasons why the defendants' *ex parte* leave application (encl. 15) was fundamentally flawed and that the leave order (encl. 20) should not have been granted by the senior assistant registrar; and they are as follows:

F (a) the ground/reason for the *ex parte* application for leave to enter a conditional appearance as referred to either in the *ex parte* summons in chambers (encl. 15) or in the supporting affidavit, in the light of the nature and content of the plaintiffs' statement of claim, which clearly is a claim for libel setting out G the particulars of the claim in detail, is materially deficient; and it follows, therefore, there has been serious non-compliance with O. 32 r. 1 and Form 62 of the RHC;

(b) the applicants/defendants have failed to make full and frank H disclosure in their *ex parte* application (encl. 15) for leave to enter a conditional appearance; and

(c) the said *ex parte* application (encl. 15) for leave was misconceived in that, since the defendants' complaint was merely that the statement of claim did not disclose any cause I of action against them, they could not have applied for leave to file a conditional appearance under O. 12 r. 6 with the view

to set aside or to strike out the notice of the writ or the service of the notice of the writ under O. 12 r. 7; the remedy relies in O. 18 r. 19 of the RHC.

[33] Now, if the defendants' *ex parte* application for leave (encl. 15) was misconceived or seriously flawed, and, notwithstanding this misconception or serious defect, the senior assistant registrar, nevertheless, had granted the leave sought for, as had, unfortunately, happened in the present case, what then is the legal status of the 'conditional appearance' (encl. 16) entered by the defendants pursuant to the *ex parte* Order (encl. 20) obtained by them? Is this court a mere helpless and mute bystander and must recognize the 'conditional appearance' as valid? In my judgment, this court cannot in law recognize the 'conditional appearance' entered by the defendants as a valid conditional appearance. At best, this court can only regard the appearance as an unconditional appearance.

[34] Now, if legally this court must regard the 'conditional appearance' (encl. 16) merely as an unconditional appearance, what is the effect then on the defendants' application to strike out the plaintiffs' *ex parte* order (encl. 5) and the service of the notice of the writ *vide* encl. 23? In my judgment, the defendants' application *vide* encl. 23 must fail since in order to make an application under O. 12 r. 7 to discharge the plaintiffs' *ex parte* order (granting leave to serve the notice of the writ out of jurisdiction pursuant to O. 11 r. 1(h)) and to set aside the notice of the writ (or the service of the writ) the defendants must first have entered a valid conditional appearance and not an unconditional appearance.

[35] However, assuming that I am wrong in my ruling on the validity of the conditional appearance (in other words, assuming I were to accept the conditional appearance as valid), I am still of the view that the defendants' application *vide* encl. 23 to discharge the plaintiffs' *ex parte* order (encl. 5) to serve the notice of the writ outside the jurisdiction and to set aside the notice of the writ must fail. I so ruled for the following reasons.

[36] Firstly, the defendants when applying for leave *vide* encl. 15 mentioned only two purposes, namely, to subsequently apply (if leave obtained) (i) to set aside the notice of the writ of summons and/or (ii) to set aside the service thereof on them. There was no mention then of the intention to apply to discharge the plaintiffs' *ex parte* order at encl. 5. Now, in my judgment, the defendants,

having obtained leave to file a conditional appearance to set aside the notice of the writ and/or to set aside the service of the notice of the writ, cannot now, armed with the conditional appearance, apply also to set aside the plaintiffs *ex parte* order at encl. 5. In law, the defendants in their application now *vide* encl. 23 must confine themselves only to the two purposes that they have specifically mentioned when applying for leave *vide* encl. 15. To now apply to the court to ask for something extra, something that, before this, they had not thought off, would be an abuse of the process of court.

[37] I now come to my second reason. The defendants summons in chambers at encl. 23 gives three grounds as to why they seek to set aside the plaintiffs' *ex parte* order (encl. 5) and the service of the notice of the writ. They are as follows (and I shall quote the defendants' summons in chambers at encl. 23):

> (1) This Honourable Court does not have the jurisdiction over the Plaintiffs claim in respect of the subject matter within the meaning of Order 11 Rule 1(h) to grant leave to issue the writ of summons out of jurisdiction.
>
> (2) There is no cause of action.
>
> (3) In the present case, there are no Civil Procedure Conventions in existence between Malaysia and Hong Kong or between Malaysia and the United States and service outside jurisdiction can only be effected pursuant to the provisions of Order 11 rule 6(2) of the Rules of the High Court 1980 being, through the Malaysian Consular Authority in the relevant Country.

[38] However, it is pertinent to recall that, as I have pointed out earlier, that the defendants when making the *ex parte* application (encl. 15) for leave to file a conditional appearance to challenge the notice of the writ and the service of the notice cited only one ground for the *ex parte* application, namely, failure on the part of the plaintiffs to disclose a cause of action in the statement of claim. In the above summons in chambers (encl. 23) this particular ground is set out as ground (2). The defendants' *ex parte* application (encl. 15) for leave to file a conditional appearance is specifically for the purpose of their application *vide* encl. 23. Now, having obtained leave to enter a conditional appearance only on that single ground, I do not think it is now legally opened to the defendants to add two more grounds (namely, (i) on jurisdiction, as set out in (1) above; and (ii) on irregular service, as set out in

(3) above) when making the application *vide* encl. 23. The defendants when making the application *vide* encl. 23 must confine themselves to that particular ground only (regardless how irrelevant the ground is in the context of O. 12 r. 7). To add further grounds at the encl. 23 stage would to my mind be improper and an abuse of process. Now, if the court were to consider only this particular ground, namely, the failure to disclose a reasonable cause of action in the statement of claim, then, the defendants' application *vide* encl. 23, as I have earlier pointed out earlier, was misconceived. It was misconceived because, as I have explained, where the defendants' complaint is that the statement of claim fails to disclose a cause of action the appropriate provision to invoke is not O. 12 r. 7 but O. 18 r. 19. I do not propose to repeat what has been deliberated earlier.

[39] In any case, can it validly be said that the plaintiffs' statement of claim fails to disclose any cause of action? In their written submission the defendants contend that the plaintiffs' statement of claim failed to plead the publication of the alleged libel. Is this contention factually correct? With respect I do not think so. I have carefully examined the plaintiffs' statement of claim. In para. 2 of the statement of claim it is averred, *inter alia*:

> ... The Asian Wall Street Journal enjoys a wide circulation in Malaysia.

[40] In para. 3 of the statement of claim it is averred, *inter alia*:

> 2. The 2nd Defendants were and are the publishers of The Asian Wall Street Journal ...

[41] In para. 4 of the statement of claim it is averred, *inter alia*:

> (3) The 3rd defendant is the author of the article entitled "Perwaja Probe Focuses on a Payment" which was published in the 15.5.02 issue of the Asian Wall Street Journal ...

[42] In para. 6 of the statement of claim it is averred, *inter alia*:

> 5. In the 15.5.02 issue of The Asian Wall Street Journal, the 3rd Defendant wrote and the 1st, 2nd and 4th Defendants published an article entitled "Perwaja Probe Focuses on a Payment" ("the Article") which is defamatory of the Plaintiffs ...

[43] In conclusion, I hold that the defendants' appeal at encl. 34 must be dismissed with costs. It must be dismissed because the learned senior assistant registrar was right in dismissing the defendants' application *vide* encl. 23 with costs. Enclosure 23 must be dismissed with costs because of the following reasons:

(1) The defendants' conditional appearance at encl. 16 must be regarded merely as an unconditional appearance as the defendants' *ex parte* application (encl. 15) seeking leave to file a conditional appearance was misconceived and fundamentally defective, which means the application for leave (encl. 15) to file a conditional appearance ought not to have been granted by the senior assistant registrar in the first place.

(2) The defendants' *ex parte* application for leave (encl. 15) was misconceived and fundamentally defective because of three reasons, namely:

(a) The ground/reason for the *ex parte* application for leave as referred to either in the *ex parte* summons in chambers (encl. 15) or in the supporting affidavit, is materially deficient; and hence there was serious non-compliance with O. 32 r. 1 and Form 62 of the RHC;

(b) the applicants/defendants have failed to make full and frank disclosure in their *ex parte* application (encl. 15) for leave; and

(c) the said *ex parte* application (encl. 15) for leave was misconceived because the intended next step contemplated by the defendants (if leave was granted) was to invoke O. 12 r. 7; but, considering the ground or reason for the ex parte application for leave, it was not appropriate for the defendants to have invoked O. 12 r. 7 of the RHC.

(3) As the court would regard the defendants' appearance only as an unconditional appearance, therefore, legally, the defendants could not have applied to set aside the plaintiffs' *ex parte* O. at encl. 5 and the service of the notice of the writ on the defendants. In order to set aside the plaintiffs' *ex parte* order, the defendants must in the first place have entered a conditional appearance (as required by O. 12 r. 7).

(4) Even if the court were to regard the defendants' appearance as a valid conditional appearance, still, the defendants, legally, could not have applied *vide* encl. 23 to set aside the plaintiffs *ex parte* order at encl. 5. This is because when applying for leave to file a conditional appearance the defendants have clearly mentioned that the application for the leave (to file a conditional appearance) was for two purposes, namely, (i) to set aside the notice of the writ summons and (ii) to set aside the service of the notice of the writ.

(5) Even if the court were to accept the defendants' appearance as a valid conditional appearance, still, the defendants when making the application *vide* encl. 23 could not bring in any other grounds other than the sole ground mentioned in their *ex parte* application for leave to enter a conditional appearance, namely, that the plaintiffs' statement of claim did not disclose any cause of action.

(6) It was misconceived for the defendants to have made an application (encl. 23) under O. 12 r. 7 to set aside the plaintiffs' *ex parte* order (encl. 5) and the service of the notice of the writ on them (the defendants). This is because, by reason of (5) above, the only complaint that could be brought by the defendants *vide* encl. 23 is that the plaintiffs' statement of claim fails to disclose any cause of action. If this then is the only complaint of the defendants, then, procedurally, the appropriate course of action that the defendants should have taken was to have entered an unconditional appearance and thereafter to invoke O. 18 r. 19(1)(a) of the RHC to apply to strike out the statement of claim and to have the plaintiffs' action dismissed.

(7) In any case, the defendants' contention that the plaintiffs' statement of claim does not disclose any cause of action is without merit as the court, upon examining the statement of claim, is satisfied that it does disclose a cause of action, namely, the tort of libel.

[Appeal dismissed with costs]